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**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA-Tucson Division**

James Richard Hathaway, an individual;

Case No. CV-00055-TUC-DTF

Plaintiff,

(Hon. D. Thomas Ferraro)

Philip Caputo, an individual;

**Plaintiff's Response in Opposition to
Defendants' Motion to Dismiss Under
Rule 12(b)(6)**

Penguin Random House, a Delaware Corporation; and

Amazon.com, Inc., a Delaware corporation

Audible, Inc., a Delaware corporation

Defendants

Plaintiff James Richard Hathaway (hereinafter, “Plaintiff”) Responds in Opposition to the Defendants’ Motion to Dismiss Plaintiff’s First Amended Complaint (“Motion to Dismiss”) (DOC. 33), or in the alternative, requests leave to amend the Plaintiff’s First Amended Complaint (DOC. 13) to cure any deficiency this

1 Court finds.¹ This Response in Opposition (“Response”) is supported by the
 2 Declaration of Jason Bergeron (“Bergeron Decl.”), the Declaration of Plaintiff James
 3 Richard Hathaway (“Hathaway Decl.”), and the exhibits attached to each declaration,
 4 respectively.

5 Defendants’ Motion to Dismiss should be denied, or alternatively, Plaintiff
 6 should be given the opportunity to amend the First Amended Complaint to cure any
 7 deficiency this Court finds. Defendants have notice of the extent of Plaintiff’s
 8 evidence and claims. Plaintiff’s evidence and claims were disclosed in its First
 9 Amended Complaint and clarified in prefiling settlement communications between
 10 Plaintiff’s counsel and Defendant Penguin Random House. Those claims and
 11 evidence are clarified further herein. Plaintiff’s Response clarifies that Defendants
 12 infringed either or both of Plaintiff’s rights to make copies or first publish several
 13 stories in the *Don Jimito* manuscript. Accordingly, if this Court believes that the First
 14 Amended Complaint is deficient under Rule 12(b)(6), Plaintiff requests leave of Court
 15 to amend the First Amended Complaint to clarify its claims against the Defendants.

16
I. INTRODUCTION

17 It is undisputable that Defendant Caputo obtained and relied on Plaintiff’s
 18 manuscript, *Don Jimito*. “Caputo admits in a public setting that he wanted to make a
 19 story about the Arizona/Mexican border but had no plot or characters until he
 20 acquired the “Don Jimito” manuscript.” First Amended Complaint, ¶ 27 (DOC 013).
 21 Plaintiff alleges that Defendant Caputo selected and paraphrased unpublished stories
 22 from Plaintiff’s manuscript (id. ¶s 13, 17, 28), and that the character of Ben Erskine in
 23 *Crossers* is unmistakably, Jim Hathaway (id. ¶s 29), and that the selection of least
 24 twelve original stories, with original protectable elements in each, were copied by

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 27 ¹ Plaintiff will request that Defendants consent to proposed amendments to Plaintiff’s
 28 First Amended Complaint and file a motion requesting leave of Court to amend if
 Defendants do not grant Plaintiff’s requested consent.

1 Defendant Caputo from *Don Jimito* (id. ¶ 30). Defendants' Motion to Dismiss does
 2 not deny the similarities alleged but instead argues that the Defendants' copying is
 3 excused by Ninth Circuit precedent. Plaintiff on the other hand contests Ninth Circuit
 4 law and Supreme Court precedent still protects Plaintiff's manuscript against
 5 Defendants' unlicensed copying and unauthorized first publication of stories from
 6 *Don Jimito*.

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8 II. **LEGAL ARGUMENT**

9 A. **STANDARD**

10 A Rule 12(b)(6) challenge requires that a court presume as true the complaint's
 factual allegations and then examine those factual allegations for plausibility. See
Ashcroft v. Iqbal, 556 U.S. 662, 678-79, 129 S.Ct. 1937, 1949-50, 173 L.Ed. 2d 868
 11 (2009). "Notice" pleading remains the rule in federal courts. *Lee v. City of Los*
Angeles, 250 F.3d 668, 679 (9th Cir. 2000) ("all the Rules require is a "short and plain
 12 statement of the claim" that will give the defendant fair notice of what the plaintiff's
 13 claim is and the grounds upon which it rests"). Moreover, so long as additional
 14 materials are consistent with the pleadings, the materials can clarify allegations of the
 15 pleading. See *Pegram v. Herdrich*, 530 U.S. 211, 120 S.Ct. 2143, 2155, 147 L.Ed.2d
 16 164 (2000).

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18 III. **BACKGROUND**

19 Plaintiff's father, James Howard Hathaway (deceased) (hereinafter "Howard
 20 Hathaway", or sometimes, "Hathaway"), authored *Don Jimito*, which recounts the life
 21 of Plaintiff's larger-than-life grandfather, Jim Hathaway, who was born in Lochiel in
 22 Santa Cruz County, Arizona in 1892, and was a renaissance man by nature and
 23 necessity. No words capture the spirit of Jim Hathaway better than those expressed by
 24 Howard Hathaway in the Forward to *Don Jimito*:

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1 “Jim was one of those rare specimens, one of those unusual combinations of characteristics,
 2 which appears once in several generations in the human, lower animal and plant kingdom. Then a
 comparable individual won’t appear for several more generations.

3 How does one label or describe such a man? Here is an attempt to set forth, in writing, a
 biography of a person so unusual that I am wondering how to begin.

4 It would require the collaboration of several who knew Jim well to produce a well rounded
 history of this enigmatic personage to each whose life touched his, for however long or briefly, a
 different but lasting impression resulted. His list of friends and admirers was long. So was the list of
 his enemies. Some of the latter hated him enough to want to kill him. Some tried and other hired
 assassins to eliminate him.

5 Whereas most average personalities can be described or summed up in two or three
 6 paragraphs, here is a man whose complex makeup defies a concise, complete analysis. It would be too
 simple to say he was many things to many people. He was many things to each who knew him for any
 7 length of time.

8 Here am I, his own son, freely confessing that I probably knew less about him and his adventures than
 others who weren’t related to him.

9 So enough of theorizing and of trying to introduce this writing. Bewildered as to where and
 10 how to begin, I must select an entrance way, commence the narrative and do my feeble best.”

11 – James H. Hathaway, Forward to *Don Jimito*.

12 Howard Hathaway wrote *Don Jimito* after the death of his father. The
 13 manuscript is a collection of tales passed down from Jim Hathaway, his friends,
 acquaintances, and relatives, that recount the life of Jim Hathaway. The extent of
 14 which each story in *Don Jimito* is 100% true is indeterminable due to the lapse in time
 and the death of eyewitnesses who have now likely all passed on. Most likely, the
 15 stories are based in truth but also embellished for entertainment’s value. The
 16 manuscript reveals however that Howard Hathaway had a talent for storytelling,
 17 which was recognizable by others. In 1985, at the “Old Main Day” event that
 18 celebrated contributions from alumni to the University over the previous 100 years,
 the Dean of Students honored Howard Hathaway and his written submission as the
 19 best or most interesting memory of Old Main from several dozen entries. Bergeron
 20 Decl. ¶s 16, 17. Moreover, that *Don Jimito* is a valuable resource of stories is
 21 evidenced not only by Defendant Caputo’s extensive reliance on the manuscript, but
 22 also by Ms. Betty Barr’s reliance who penned several columns on Jim Hathaway in a
 23 Santa Cruz county periodical *The Bulletin* and also used the manuscript as a resource.
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1 **IV. COPYRIGHT AND NINTH CIRCUIT LAW PROTECTS AN
2 AUTHOR'S ORIGINAL EXPRESSION, AND SELECTION AND
3 ARRANGEMENT**

4 Copyright law serves to protect the original works authors by prohibiting
 5 copying by others. U.S. CONST. art. I, § 8, cl. 8. Registration of the work grants the
 6 copyright owner a private monopoly on the work for a limited time to print, reprint,
 7 amend, adapt, copy, and perform the copyrighted work. 17 U.S.C. § 106. One is liable
 8 for copyright infringement occurs when he violates one or more of the copyright
 9 owner's exclusive rights as enumerated in Section 106 of the Copyright Act of 1976,
 10 such as the right to reproduce the work, publish the work, and prepare derivative
 11 works. 17 U.S.C. § 106 (1990). The test for copyright infringement in the Ninth
 12 Circuit is the "substantial-similarity" test, which has within with extrinsic and
 13 intrinsic tests. *Funky Films, Inc. v. Time Warner Ent. Co., L.P.*, 462 F.3d 1072, 1077
 14 (9th Cir. 2006). Substantial-similarity requires an *extrinsic* examination of the
 15 similarities between only the protectable elements of an original work and an accused
 16 work, followed by a jury's *intrinsic* consideration of an ordinary person's impressions
 17 of the similarities between the two works. *Apple Computer, Inc. v. Microsoft Corp.*,
 18 35 F.3d 1435, 1444 (9th Cir. 1994). The "extrinsic" test, "focuses on 'articulable
 19 similarities between the plot, themes, dialogue, mood, setting, pace, characters, and
 20 sequence of events' in the two works." *Funky Films v. Time Warner Entertainment
Co.*, 462 F.3d 1072, 1077 (9th Cir. 2006) (quoting *Kouf v. Walt Disney Pictures &
Television*, 16 F.3d 1042, 1045 (9th Cir. 1994)). The extrinsic analysis examines
 21 protectable expression in each work excluding ideas, historical facts, common
 22 phrases, scenes-a-faire. *Corbello v. Valli*, 974 F.3d 965 (9th Cir. 2020). "Protectable
 23 expression includes the specific details of an author's rendering of ideas..." *Funky
Films*, 462 F.3d at 1077 (quoting *Metcalf v. Bochco*, 294 F.3d 1069, 1074 (9th Cir.
 24 2002)). "The 'intrinsic test' is a subjective comparison that focuses on 'whether the
 25 ordinary, reasonable audience' would find the works substantially similar in the 'total
 26 concept and feel of the works.'" Id. (quoting *Kouf*, 16 F.3d at 1045). *Benay v. Warner
Bros. Pictures Inc.*, 16 F.3d 1042, 1045 (9th Cir. 1994).

1 *Bros. Entm't Inc.*, 607 F.3d 620 (9th Cir. 2010). Ninth Circuit law also protects an
 2 author's selection and arrangement of unprotectable elements if the elements are
 3 numerous enough, and their selection and arrangement original enough, that their
 4 combination constitutes an original work. *Corbello v. Valli*, 974 F.3d 965 (9th Cir.
 5 2020). "[W]hat a selection and arrangement copyright protects is the particular way in
 6 which the artistic elements form a coherent pattern, synthesis, or design." *Id.*, (quoting
 7 *Satava v. Lowry*, 323 F.3d 805, 811 (9th Cir. 2003)).

8 Defendants assert that the extent of which Defendant Caputo copied from *Don*
 9 *Jimito* manuscript comprises mere historical facts and *scenes-a-faire* that are not
 10 protectable copyright protection. Plaintiff disagrees and alleges instead that the value
 11 that Defendants obtain from *Don Jimito* is not from the facts or the any alleged
 12 *scenes-a-faire* that were copied, but from the author James Hathaway's original
 13 selection of stories about his father and his unique and protectable expression in those
 14 stories that Defendants paraphrased.

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**A. DEFENDANT CAPUTO OBTAINED AND PARAPHRASED
 STORIES IN DON JIMITO WITHOUT LICENSE FROM
 PLAINTIFF**

18 On information and belief, Defendant Caputo only once acknowledged the
 19 extent of his reliance on the *Don Jimito* manuscript during a speech for what appears
 20 to be a book-tour for *Crossers*. (Bergeron Decl. ¶¶ 1-6.) Yet, the Acknowledgements
 21 in *Crossers* fails to credit Hathaway with authorship or reveal *Don Jimito* as a
 22 resource, which is an implicit assertion by Defendant Caputo that he created the
 23 stories. During his speech, Caputo confessed:

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*"I had nothing in the way of plot or characters until, through a ranching
 couple we know, I came into possession of a yellowed, typewritten manuscript about a
 man named Jim Hathaway. It wasn't signed, but the author evidently was Hathaway's
 son, now deceased."*

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1 Defendant Caputo's book-tour confession rings true. The extent of
2 paraphrasing by Defendant Caputo is remarkable. True and correct copies of the text
3 from the associated passages from *Don Jimito* and *Crossers* are copied into a table in
4 side-by-side columns and attached as Exhibit B to the Declaration of Jason Bergeron.
5 The discussion of those passages below leaves little doubt that the stories selected and
6 paraphrased by Defendant Caputo in *Crossers* were originally selected and written by
7 James Hathaway in *Don Jimito*, but without credit to or license from Plaintiff.

8 1. THE LADY IN THE KNIFE

9 In the passages from *Don Jimito* and *Crossers*, young, school age, Jim and
10 Ben, each possess a knife with an alluring depiction of a woman that could only be
11 seen if held up to the light in a certain way. (Id., Exhibit B, pg. B2.) Extrinsic
12 analysis of copyright infringement includes a comparison of themes, style, mood, and
13 an original presentation of facts. *Corbello*, 974 F.3d at 975. The alleged facts in this
14 story (i.e., Jim's possession of a knife with secret, risqué feature), are historically
15 insignificant, but Hathaway's passage conveys more than rote facts. Hathaway's use
16 of the word "one" rather than referring to young Jim Hathaway (i.e., "If *one* held the
17 handle up to the light ...") (italics here)) causes or allows the reader to visualize him or
18 herself holding the knife to the light to see the lady in the knife. The passage also
19 conveys Hathaway's expression of a theme that young boys of the region and era,
20 who likely had little in the way of personal possessions, would cherish a knife with a
21 secret risqué feature. Hathaway expresses this theme by informing that the knife was
22 envied by other boys and that young Jim Hathaway took good care of the knife as he
23 kept it "plenty" sharp. Defendant Caputo copied the same basic elements from
24 Hathaway's passage about Ben Erskine's special knife. Defendant's passage uses
25 "Holding..." rather than refer to young Ben (i.e., "*Holding* the knife up to the light
26 ..." (italics here)), which copies Howard Hathaway's expression of this visual.
27 Moreover, Defendants also emphasize that Ben's knife was the "envy of the other
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1 boys”, which copies Howard Hathaway’s expression of the same theme of the
 2 importance of such a knife to young Jim or Ben.

3 2. GANG FIGHT

4 School age Jim/Ben each get into a gang fight and knock a Mexican kid out
 5 with slingshot projectile. (Id.) Jim/Ben then flees to hide fearing he had killed the kid.
 6 Ultimately, this passage is not about the alleged Gang Fight. Howard Hathaway’s
 7 protection expression comprises selecting and including this random Gang Fight story
 8 from numerous possible stories about Jim Hathaway (or any other real or fictitious
 9 person) to convey to the reader that the relationship between Jim Hathaway and his
 10 mother was challenging due to young Jim’s wild streak. Defendants’ effort to convey
 11 the same theme, that Ben Erskine and his mother had a challenging relationship, is
 12 unremarkably also expressed by selecting and paraphrasing the very same Gang Fight
 13 story.

14 3. RIDING A HORSE INTO A SALOON TO FIGHT

15 In this story, Jim/Ben rides a horse into a saloon and jumps from the saddle
 16 onto a man and beats the man with his fists. (Id.) Hathaway’s use of the phrases,
 17 “rode his horse through the door of a saloon and leapt onto a man” and “Jim flattened
 18 him” evoke the visual image of a crazy start to a barroom brawl that ends with a
 19 vicious beating by Jim Hathaway. Defendant Caputo copied the imagery with use of
 20 words and phrases like “jumped from saddle” and “commenced to whale on him” to
 21 evoke the same imagery used by James Hathaway for Ben Erskine in *Crossers*.

22 4. HORSE CHASE AND KILLING

23 In this passage, preadolescents Jim/Ben each visit a saloon in Mexico to fetch a
 24 jug of tequila for their grandfather. (Id. pgs. B2-B4.) In the story, a large Mexican bar
 25 patron intimidates Jim/Ben, so the bartender helps the Jim/Ben evade the bar patron
 26 through a backdoor of the bar, which ends in a horse chase and the death of the
 27 pursuer and hiding of the body. (Id.) James Hathaway’s storytelling conjures a mental
 28 image of the fear and intimidation young Jim feels in the bar, then a 10–11-year-old

1 boy being “eyed” and then “cursed at” by a “big, mean looking, half-drunk Mexican”,
 2 being “eased out the back [of the saloon]” by the bartender before he “heard a horse
 3 coming up fast behind him”, the panic or anger as the Mexican “lashed Jim’s little
 4 horse across the rump”, Jim’s fear of not knowing if the thrown Mexican was dead
 5 from the fall, and Jim’s panic in cutting of the Mexican’s throat and hiding of the
 6 body in a well. Hathaway’s choice of words and pacing of the story causes the reader
 7 to feel young Jim’s intimidation from the Mexican bar patron’s torments, feel his
 8 panic from hearing the Mexican’s horse coming up fast, the anger and violation Jim
 9 felt from his horse being lashed by the Mexican, and finally, the desperation and fear
 10 as with “urgent concern”, Jim “hurriedly dismounts and runs” to the thrown Mexican,
 11 and “took out the knife and without delay cut his late pursuers throat” and
 12 subsequently hid the Mexican’s body in a well.

13 The Defendants’ story copies Hathaway’s pacing and choice of emphasis of
 14 events. Ben likewise is intimidated and verbally tormented by the Mexican in the bar,
 15 slips out the back, and then fear and panic ensues when Ben “...hears rapid hoofbeats
 16 behind him” and when “[the Mexican] cracks Maggie’s haunch with the ramal.”
 17 Defendants also emphasize the feeling of desperation by young Ben who “...hates
 18 this drunken vaquero for making him afraid., draws his knife, and with one swift
 19 stroke he opens in the Mexican’s throat” and subsequently, with some “tugging and
 20 shoving that soaks him in sweat, rolls the body into a mine shaft” to hide the body.

21 5. VIGILANTE JUSTICE

22 Jim/Ben each conspire with a Border Patrol Agent, Lon/Lee, respectively, in
 23 *Don Jimito/ Crossers* to catch and kill a Mexican smuggler in the mountains that they
 24 are tired of arresting. (Id. pg. B4.) Lon/Lee is shot by the smuggler but does not die
 25 immediately, and rides/crawls to a nearby ranch and later dies. In this passage, James
 26 Hathaway evokes the impression that Jim Hathaway was not above vigilante justice,
 27 if he felt it was justified. Defendants copied this same story to convey the same trait in
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1 Ben Erskine, a man willing to eschew legal formalities that impede what he
 2 considered to be deserved justice.

3 6. NIGHTTIME AMBUSH

4 Jim/Ben are at a friend's house and go outside at nighttime for water and is
 5 ambushed and shot at by hired outlaws/gunmen. (Id. pg. B5.) Jim's/Ben's friend
 6 shoots back and thinks he has hit one of the gunmen and goes to investigate. Id. Turns
 7 out the hired outlaw/gunman was faking injury and jumps up and wrestles with
 8 Jim's/Ben's friend and then breaks away and tries to get into Jim's/Ben's friend's
 9 locked house. Id. Jim/Ben then shoots the man in the face/head at close range. Id.

10 James Hathaway's words illustrate an attempt on Jim Hathaway's life by hired
 11 outlaws. Jim is ambushed at home at night with his friend. Together they are helping
 12 Jim's wife, Virge, can chilis. James Hathaway's words and style illustrate how a quiet
 13 evening at the Hathaway home could switch immediately to a harrowing gunfight and
 14 life-threatening ordeal. The reader can visualize the calm imagery of a border region
 15 home, roasting chilis, which immediately switches to the nighttime gunfight, the
 16 surprise of Jim's friend Valentino, who at first thinks he has stopped the outlaw but
 17 then ends up in a physical struggle with the outlaw for his life. The story then turns to
 18 a threat to Virge when the gunman "broke loose and made for the screen door" where
 19 Virge is canning chilis. Finally, James Hathaway conveys amazement that Jim
 20 remained calm and collected as he, "knelt down, held his pistol with both hands, took
 21 careful aim and shot." Aside from several, alleged facts, Defendants copied the same
 22 style and pacing of James Hathaway's story. Defendants modified the story to some
 23 extent, but the kernel of James Hathaway's protected expression remains. Defendants
 24 emphasized the roasting and canning of peppers to emphasize the ordinariness of the
 25 evening, the harrowing switch to a gunfight, the physical grappling between Mendoza
 26 and the gunman, the panic when the gunman "broke free and sprinted for the house",
 27 and the feeling of awe or respect when Ben "calmly" shoots the gunman in the head.
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1 7. JIM'S/BEN'S DEATH

2 Jim/Ben as older men each have their heads crushed and are killed in a corral
3 while taming a wild cow/horse. (Id. pg. B5-B6.) James Hathaway's style and imagery
4 describes the brutality of father's death by a "mad cow" and counterbalances that
5 brutality by noting the tragic but unremarkably accidental cause of his father's death.
6 Howard Hathaway wrote: "So the man who in turn had pursued and evaded enemies
7 seeking his demise most of his life and met his end because of the swift charge of a
8 mad cow." Defendants paraphrased this story of Ben Erskine's death by a "rank
9 horse" in a corral and similarly note Ben Erskine's tragic accidental death with a
10 sentence of the same structure, style, and imagery: "And so the man who had survived
11 so many perils, who had evaded death at the hands of so many enemies, was killed as
12 father had been, by a rank horse."

13 8. HARSH DISCIPLINE

14 In a first story, young Jim/Ben are each forced by their mother to walk barefoot
15 over sharp objects as punishment, and she refuses to pick them up when they cry. (Id.
16 pg. B6.) In a second story, Jim's/ Ben's mothers strap them and/or their siblings into
17 highchairs while she leaves to visit with friends or shop. (Id.) There is no historical
18 significance to the alleged fact that young Jim was forced to walk "barefoot over
19 sharp objects" or restrained to a "highchair" while his mom shopped or visited
20 friends. Howard Hathaway's original selection however, and coupling of two
21 unrelated and distinct stories, impresses upon the reader Jim Hathaway's exposure at
22 a young age to harsh discipline and detached parenting, and in turn explains his
23 father's resilience, toughness, and belief in harsh discipline. Howard Hathaway's
24 original selection of two unrelated stories comprises his original expression and is
25 protectable by copyright. Defendants also copied or paraphrased Hathaway's
26 selection of these same two unrelated stories to described Ben Erskine's mother's
27 concept of discipline and parenting, and thereby copied Howard Hathaway's
28 protected expression.

1 9. COWBOY CHOW

2 In this story, Cowboys Jim/Ben were riding horses working a herd all day and
3 come back to camp tired and hungry and commence eating from a pot of beans that
4 had been cooking all day at camp without the lid on the pot, and into which
5 grasshoppers had jumped. (Id.) Howard Hathaway's selection of this story provides
6 entertainment but also conveys his expression of a theme that Jim Hathaway was not a
7 fussy individual and rather capable of physically demanding cowboying work. The
8 story also includes Howard Hathaway's protected expression in his style of writing,
9 sequence of events, and word choice. James Hathaway provides the explanation for
10 "crunchy" beans only after providing a mental picture of cowboys, famished and
11 exhausted after a long day's work, devouring their supper that does not seem quite
12 right, but continue to eat anyway because they are just too tired and hungry to
13 investigate their oddly textured meal of beans - which readers recognize should not,
14 "crunch." Hathaway saves the explanation for the odd textured meal to build suspense
15 and give the reader the same unwelcome revelation that Jim Hathaway and his friends
16 experience. Further, Hathaway's use of the word "crunchy" evokes a mental image
17 and sound in the reader's mind because the reader knows that beans cooked on a pot
18 all day should be soft and not "crunchy." Defendants copied Hathaway's same
19 sequence of storytelling events to provide the same unwelcome revelation to the
20 reader to explain the "crunchiest" beans, and only after providing a mental picture of
21 cowboys, exhausted and famished after a long day's cowboying work.

22 10. MAILMAN AS MATCHMAKER

23 In this introduction and courtship story, Virgie (Jim's wife) / Ida (Ben's wife)
24 each ask the mailman for mail/a letter from no one in particular. (Id. pg. B6-B7.) The
25 mailman hints to Jim/Ben that Virgie/Ida wants a letter. (Id.) Jim/Ben get the hint and
26 writes Virge/Ida, which leads to Jim and Virgie's/Ben and Ida's relationships and
27 later, marriages. (Id.)

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1 James Hathaway uses writing style to convey that Virge Parker cleverly
 2 initiated her relationship with Jim Hathaway via a hint to the mailman by “jokingly
 3 told the mailman to bring her a letter” thereby hinting that the mail carrier should
 4 relay her wish that Jim Hathaway should write her a letter, which the mailman
 5 successfully relayed to Jim. Defendants copied James Hathaway’s original style and
 6 expression in the story of Ida and Ben: “You never bring any mail for me” is a
 7 “joking” way of hinting that Ida wants the mailman to bring her mail.

8 11. ASKING FATHER-IN-LAW FOR PERMISSION TO MARRY

9 In this engagement story, Jim/Ben each ask their future fathers-in-law, Jim
 10 Parker/Merle Barnes, for permission to marry Virgie/Ida on the front porch, during a
 11 discussion about livestock prices, and with Virgie/Ida hiding and listening in on their
 12 conversation. (Id. pg. B7.) Jim Parker/Merle Barnes gives his consent. (Id.)

13 Howard Hathaway selected the two previous “Matchmaker” and “Asking”
 14 stories to describe the courtship and engagement of Jim Hathaway and Virgie Parker.
 15 James Hathaway’s selection of these stories includes his expression of the theme or
 16 concept introductions, courtship, and engagement between couples of the era and
 17 region, such as Jim and Virgie, or Ben and Ida, were not steamy romances but instead
 18 innocent and practical. Howard Hathaway’s writing style and imagery here indicates
 19 the conversation and tone is casual (i.e., “on the front porch talking about the current
 20 cattle prices”) and Jim Hathaway’s interjection of a question of significant magnitude.
 21 Hathaway further emphasizes the casual nature of the conversation by addition of a
 22 quoted response, “I guess so” by Jim Parker and the resumption of the livestock price
 23 discussion. Defendants copied the style and imagery of Hathaway’s expression of
 24 these personal family stories. Defendants portray same the casual tone (i.e., “on the
 25 front porch jawing about horses and cattle prices”) and copied Hathaway’s use of a
 26 quoted response by Merle Barnes, “Reckon that would be all right,” and the
 27 resumption of discussion about livestock to emphasize the informality of an otherwise
 28 important conversation in the same way that Howard Hathaway did.

1 12. PRISON DESCRIPTION

2 A Mexican prison in each passage is described with two ways of execution: by
 3 firing squad and by forced water-and-food fast, followed by unlimited food and water,
 4 which caused death by intestinal stoppage. (Id. pg. B7.) Howard Hathaway's writing
 5 provides the reader an ugly visual: a cliff base "...with bullet dents and blood
 6 stains..."; and death by "...with-hold eats and drink for 3 or 4 days...", after which
 7 "...they were allowed all the tortillas and water they wanted..." "...resulted in a
 8 doughy mess ...which caused death by intestinal stoppage and bloat." Defendants
 9 changed a few details but paraphrased James Hathaway's imagery, style, and
 10 grammar, to convey a realistic, horrific description of the prison to the reader.
 11 Defendants' passage describes a firing squad wall with "... a lot of blood stains and
 12 bullet holes for when they wasn't practicing..." and "they would starve them for days
 13 and not give them nothing to drink. Then when they were hungry enough to eat their
 14 shoes and thirsty enough to eat their shoes and thirsty enough to drink their own pee,
 15 they'd be fed all the tortillas and beans and water they could hold. The food would
 16 form a big glob in their bellies and bung them up, and they would die of a busted gut."
 17 Just as in Plaintiff's passage, the Defendants' passage copies the grammar and
 18 narrative style to convey the horrors of the Mexican prison.

19
 20 B. **DEFENDANTS COPIED JAMES HATHAWAY'S ORIGINAL
 SELECTION OF STORIES AND VIOLATED PLAINTIFF'S
 COPYRIGHT.**

21 The stories in *Don Jimito* likely comprise a significant quantity of factual
 22 content about Jim Hathaway's life and adventures, which Defendants allege may be
 23 freely copied. Howard Hathaway's original expression in each story, however, and his
 24 selection of stories to form a cohesive expressive work, is not for free for unlicensed
 25 appropriation. *Narell v. Freeman*, 872 F.2d 907, 911 (9th Cir. 1989) ("Historical facts
 26 and theories may be copied, as long as the defendant does not "bodily appropriate" the
 27 expression of the plaintiff.") citing *Landsberg v. Scrabble Crossword Game Players*,

1 *Inc.*, 736 F.2d 485, 489 (9th Cir.1984), *cert. denied*, 469 U.S. 1037, 105 S.Ct. 513, 83
 2 L.Ed.2d 403 (1984).

3 Howard Hathaway's original selection of stories for *Don Jimito* also comprises
 4 his original expression. Hathaway's selection of stories conveys his original
 5 expression of themes that reoccurred throughout the life of his father. These themes
 6 were themes such as: turn of the 20th century at the Arizona-Mexico border region
 7 was informal, and sometimes lawless and dangerous; that early 20th century border
 8 region youth were the product of harsh discipline, a rough, sometimes violent, often
 9 unsupervised, childhood; and that young men of the region and era were sometimes
 10 forced to rely on various skills such as riding, shooting, and fighting, and traits such
 11 as bravery, grit, and violence, to survive. While the ideas and themes of these stories
 12 may not be protected by copyright law, James Hathaway's original *selection* of stories
 13 to convey or describe a coherent, synthesized collection of stories including these
 14 themes and describing Jim Hathaway's life, is protectable expression. *Corbello v.*
 15 *Valli*, 974 F.3d 965 (9th Cir. 2020). Moreover, even assuming the events in these
 16 stories are 100% true, the "facts" in these stories are facts about Jim Hathaway – these
 17 "facts" are not facts about Ben Erskine, who is a *fictional* character. In other words,
 18 the selection of stories and facts therein may be necessary to accurately describe the
 19 life of Jim Hathaway, but Defendants' use of facts and selection of the same stories
 20 Hatchway uses and selected is wholly unnecessary to describe the life of a fictional
 21 character. Defendants could have created wholly original stories with the same themes
 22 without any need to paraphrase Hathaway's original works. *Id.* at 971. (the Court
 23 reasoning there: "Neither Valli nor the other defendants violated Corbello's copyright
 24 by depicting in the Play events *in their own lives* that are also documented in the
 25 Work.") (Emphasis here.) Defendants selection of the stories from *Don Jimito* copies
 26 Hathaway's original selection and expression of themes in *Don Jimito*, which totals
 27 too much copying. "Even a small taking may sometimes be actionable." *Norse v.*
 28 *Henry Holt and Co.*, 991 F.2d 563 (9th Cir. 1993), *citing e.g., Harper & Row*

1 *Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 565, 105 S.Ct. 2218 2233, 85
2 L.Ed.2d 588 (1985) (ruling that taking 300 words from presidential memoirs not fair
3 use when copied words were "the heart of the book"). Defendants selection and use
4 of Howard Hathaway's stories paraphrase events from Jim Hathaway's childhood,
5 adolescence, courtship and engagement, adult life, and even his death. Defendants'
6 selection of stories has taken more than the "heart" of *Don Jimito*, Defendants have
7 taken the description of Jim Hathaway's entire life.

8

9 **V. COPYRIGHT AND NINTH CIRCUIT LAW PROTECTS A**
10 **COPYRIGHT OWNER'S RIGHT TO FIRST PUBLICATION**

11 The Copyright Act's protection of the right of *first publication* is expressed by
12 the copyright holder's right to "print" and expressly made subject to the fair use
13 provisions of § 107 of the Copyright Act. *See Harper Row, Publishers Inc v. Nation*
14 *Enterprises*, 471 U.S. 539, 549-555, 105 S.Ct. 2218, 85 L.Ed.2d (1985). The
15 Supreme Court's precedent recognizes a difference between published and
16 unpublished works. This precedent recognizes that a copyright owner's right to decide
17 if, when, where and how, his or her work is published. *Id.* In *Harper & Row v. Nation*
18 *Enterprises*, 471 U.S. 539 (1985), former U.S. president Gerald Ford's memoir was
19 unpublished, and he had an agreement with Harper & Row giving the publisher the
20 right to publish his work first. *The Nation* newspaper, however, published an excerpt
21 from the memoir without Harper & Row's permission, who sued the newspaper. The
22 Supreme Court found for Harper & Row despite the newspaper's defense that the
23 publication was fair use. The Supreme Court rejected the newspaper's argument and
24 reasoned that it had infringed President Ford's exclusive right to first publication
25 since it published the excerpt without permission and before President Ford or Harper
26 & Row had a chance.

27

28

1 **A. DEFENDANTS PUBLISHED SEVERAL OF PLAINTIFF'S
2 UNPUBLISHED STORIES WITHOUT PERMISSION AND
3 INFRINGED PLAINTIFF'S RIGHT OF FIRST PUBLICATION.**

4 Defendants' book *Crossers* was published in 2010 and includes paraphrased
5 versions of at least twelve (12) stories from Plaintiff's manuscript. Defendants also
6 copied numerous other details and facts from the manuscript not mentioned in this
7 Response, but when considered together with the stories discussed herein, contribute
8 Defendants' violation of Plaintiff's right of first publication under the Copyright Act.
9 As the Ninth Circuit Court wrote in *Monge v. Maya Magazines, Inc.*², "[t]he right of
10 first publication implicates a threshold decision by the author *whether and in what*
form to release his work." quoting *Harper & Row* 471 U.S. at 553, 105 S.Ct. 2218
11 (emphasis by Ninth Circuit Court)). Publication of a work without the copyright
12 owner's permission and before he has authorized dissemination "seriously infringes"
13 the right to decide when and whether the work will be made public. *Id.* at 1182.

14 a) *Betty Barr's Publication of Stories was Unauthorized.*

15 As a defense, Defendants' Motion to Dismiss suggests that the stories they
16 paraphrased were first published by others, including Ms. Betty Bar. Defendants'
17 mistaken belief however is not a defense to their subsequent violation of Plaintiff's
18 right. In a civil suit, liability for copyright infringement is strict. *United States v. Liu*
19 731 F.3d 982 (9th Cir. 2013) citing *Monge*. 688 F.3d at 1182 ("[T]he innocent intent
20 of the defendant constitutes no defense to liability.'...').

21 As background, Barr alleges in a July 2005 column that she collaborated with
22 Howard Hathaway in 2000 to publish stories from *Don Jimito*. On information and
23 belief, and because of the alleged collaboration, certain first stories from the
24 manuscript were published in *The Bulletin* newspaper. (Bergeron Decl. ¶ 19). Plaintiff
25 does not allege however that those certain first stories were copied or paraphrased into
26 *Crossers*. (Bergeron Decl. ¶ 20). Plaintiff complains in this action of other stories

28 ² 688 F.3d 1164, 1182 (9th Cir. 2012)

1 from the manuscript that were subsequently published long after Howard Hathaway's
 2 death and without his heir's required authorization.

3 The alleged collaboration between Barr and Howard Hathaway ended when
 4 Hathaway died in November of 2000. (Hathaway Decl. ¶ 6). Any alleged license held
 5 by Barr also ended at that time: either by operation of law when Howard Hathaway
 6 died, whereupon all rights to the manuscript transferred to his wife, Alberta
 7 Hathaway; or when Barr read a letter from Plaintiff sent January 2, 2001 ("Plaintiff's
 8 2001 letter"), informing Barr of his father's death, and conveying Alberta's express
 9 rescission of permission to publish stories from the manuscript. (Hathaway Decl. ¶¶s
 10 13, 14). Barr's July 2005 column confirms her receipt of Plaintiff's 2001 letter. Barr's
 11 four-year compliance with the Plaintiff's demand to cease continued until 2005,
 12 when, and without Alberta's or Plaintiff's consent, Barr resumed publication of
 13 stories from the manuscript. (Hathaway Decl. ¶ 18). Barr resumed publication of
 14 stories from the manuscript after alleging in her column that she received a letter from
 15 the sister of Howard Hathaway, Marion Hathaway Bittinger, wherein Barr alleges that
 16 Marion wrote her: "I am sorry [I asked Plaintiff to write the letter asking you to stop].
 17 (Bergeron Decl. ¶ 28).

18 Whether Barr misinterpreted Marion's letter as permission to resume
 19 publication of tales from the manuscript, or she simply did not care that she violated
 20 Alberta's copyrights, is immaterial - Marion's alleged letter does not, *alas because*
 21 *she cannot*, grant Barr permission to use a manuscript in which she has no rights.
 22 Howard Hathaway resided in and died in Idaho. (Hathaway Decl. ¶ 6). Howard
 23 Hathaway's surviving spouse, Alberta Hathaway was the sole intestate heir to the
 24 marital community property, which included the *Don Jimito* manuscript. *Nebeker v.*
 25 *Piper Aircraft Corp.*, 747 P.2d 18, 19 (Idaho 1987). Moreover, Barr's conduct is
 26 irrelevant to Defendants' liability. Liability for copyright infringement is strict and
 27 Barr's prior violation of Plaintiff's right of first publication has no bearing on
 28 Defendant's liability for the same violation. *Monge*, 688 F.3d at 1170 (9th Cir.2012)

1 (citing 4 Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 13.08[B][1]
2 (Matthew Bender rev. ed. 2011)).

3 Defendants have the burden of proving that their infringement was innocent.
4 See 17 U.S.C. § 504(c)(2); *Los Angeles News Service v. Reuters Television Intern.*,
5 Ltd., 149 F.3d 987, 996 (9th Cir. 1998). Defendants cannot prove they were entitled
6 to select, paraphrase, and publish stories from the manuscript without Plaintiff's
7 permission. Defendants conduct violates of Plaintiff's right of first publication and
8 Plaintiff's First Amended Complaint includes ample notice of Plaintiff's claim against
9 Defendants' violation.

10
11 **VI. Conclusion**

12 A motion to dismiss for failure to state a claim should be granted only if it
13 appears beyond doubt that the plaintiff can prove no set of facts in support of his
14 claim which would entitle him to relief. *In re Zimmer*, 313 F.3d 1220, 1222 (9th Cir.
15 2002). This Court should accept as true the well-pleaded factual allegations in the
16 complaint. *Skilstaf, Inc. v. CVS Caremark Corp.*, 669 F.3d 1005, 1014 (9th Cir.2012).
17 Plaintiff's First Amended Complaint pleads (i) Defendant Caputo's admission that he
18 had "nothing in the way of plot or characters" without Plaintiff's manuscript, (ii)
19 Plaintiff's allegation that Defendants' character Ben Erskine was based on the
20 protectable expression in the manuscript's stories and selection of stories about
21 Plaintiff's grandfather, and (iii) that Defendants published Plaintiff's previously
22 unpublished stories without permission. The allegations of Plaintiff's First Amended
23 Complaint, taken as true establish that Defendants' work, *Crossers* paraphrased
24 original expression in stories from Plaintiff's manuscript *Don Jimito*, copied
25 Plaintiff's original selection of stories from the manuscript, and published those
26 paraphrased stories first and without permission from Plaintiff. Based on the above,
27 Plaintiff requests that this Court deny the Defendants' Motion to Dismiss, or if
28

1 necessary, grant Plaintiff leave to amend the First Amended Complaint to cure any
2 deficiency this Court finds.

3

4 Dated this 5th day of February 2021

5

6 **Venjuris, P.C.**

7

8 By /s/ Michael F. Campillo
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10 1938 East Osborn Road
11 Phoenix, Arizona 85016
12 Tel: 602-631-9100
13 Fax: 602-631-4529
14 E-Mail: mcampillo@venjuris.com
15 Attorneys for Plaintiff

16

17

CERTIFICATE OF SERVICE

18

19

20 I hereby certify that on 2021-02-05, I electronically transmitted the attached
21 document and attached Declarations of Jason Bergeron and James Richard
22 Hathaway to the Clerk's Office using the CM/ECF System for filing and
23 transmittal of a Notice of Electronic Filing to the following CM/ECF
24 registrants:

25

26 David Jeremy Bodney
27 bodneyd@ballardspahr.com,
28 kinseyC@ballardspahr.com,
litdocket_west@ballardspahr.com

29

30 Robert S Gutierrez
31 GutierrezR@ballardspahr.com,
32 LitDocket_West@ballardspahr.com,
33 ToyamaK@ballardspahr.com

34

35 s/ Michael F. Campillo

36

37

38